No. 59

IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

UNITED STATES OF AMERICA, *Petitioner,*

v.

FIRST NATIONAL CITY BANK, *Respondent,*

—and—

OMAR, S.A., a Uruguayan corporation; LAZARD FRERES & CO.; LEHMAN BROTHERS; BELGIAN-AMERICAN BANKING CORP.; BELGIAN-AMERICAN BANK AND TRUST CO.; and FIRST NATIONAL CITY TRUST CO., *Defendants.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT FIRST NATIONAL CITY BANK

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Questions Presented

The court of appeals, sitting en banc, has found that the power of a district court over the head office management of an American bank did not justify the court in requiring that bank to take action in a foreign country with respect to property of another, there situated, which was

beyond the jurisdiction of both the Internal Revenue Service and the court itself. The questions presented are:

1. Must the determinations of the court of appeals be reversed to aid petitioner's attempts at extra-territorial enforcement of its *ex parte* tax assessments, despite the finding of the court of appeals that the powers sought by petitioner would "impose an intolerable burden on the banking community"? (R. 45).

2. May a district court employ the drastic provisional remedy of injunction in an action in which it has no jurisdiction to enforce a final order?

Statement

The petitioner has invoked the power of the district court over the respondent bank, or more accurately its head office management, to force the bank to perform an act beyond the capabilities of either the petitioner or the court itself.

The petitioner seeks to reach property or rights to property of Omar, S. A., a Uruguayan corporation, and to apply that property against taxes claimed to be owing by that foreign corporation. In aid of that attempt, in the late afternoon on October 31, 1962 the petitioner served upon the respondent bank a notice of tax lien and a notice of levy (see R. 23), a temporary restraining order contained in an order to show cause, which sought the issuance of an injunction against the bank (R. 9-10), and a summons and complaint (R. 3-8) in which the petitioner prayed that the district court compel the respondent bank "to return all property and rights to property of . . . Omar, S. A., to the jurisdiction of [the district court] for disposition and application" with respect to petitioner's tax claim (R.

23).* The district court granted the requested injunction (R. 30-31).

The court of appeals reversed the decision of the district court and that reversal was adhered to after rehearing en banc. The court of appeals, balancing the "intolerable burden on the banking community" (R. 45) against the benefits which petitioner claimed could accrue to the revenue authorities from exercise of the admittedly novel power demanded, concluded that a grant of that power "would lead only to harmful consequences for our banking system abroad without any concomitant benefits here at home" (R. 48). Thus, the court of appeals expressly founded its decision not only upon what the dissenting judge conceded was "an admirable display of my colleague's well-known erudition and of his customary careful and exhaustive research" (R. 49) but also upon a careful weighing of the policy considerations. The court of appeals concluded, after argument, reargument and extensive briefing, that the unprecedented prerogative demanded by the petitioner would be a self-defeating mechanism, proscribed not only by the relevant authorities but by all considerations of reason and justice.**

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* For the purposes of argument, we will assume, as did the court of appeals, that at the time of service of the papers Omar maintained an account at the Montevideo branch of the respondent bank.

** The decision of the court of appeals has been favorably reviewed in legal periodicals. *E.g.*, 64 Colum. L. Rev. 774 (1964); 62 Mich. L. Rev. 1084 (1964);

> "The instant decision reaffirms and reinforces a body of law long recognized in the field of foreign branch banking. Without the separate entity doctrine, the stability of our branch banking system would be greatly altered. For reasons of precedent and practicality, this court [the Second Circuit] reached a sound decision in extending the doctrine to apply to an injunction proceeding." 9 Vill. L. Rev. 339, 343 (1964).

Summary of Argument

The respondent bank is a party to this proceeding only because it is alleged to be in possession of property or property rights of Omar; there is no suggestion that the respondent is itself delinquent in respect of any taxes or in performance of any obligations lawfully imposed upon it. The hypothetical property of Omar which the petitioner seeks to reach is not within the jurisdiction of the court; if it exists at all it lies outside the borders of the United States and within the territory of friendly foreign sovereigns.

The accuracy of these statements was recognized by the district court and in the dissenting opinion in the court of appeals; on this point there is judicial unanimity.

The petitioner seeks to sequester bank accounts allegedly maintained by Omar with foreign branches of the respondent bank. Such accounts, if they exist, are contracts made and to be performed in and under the laws of foreign countries, in respect of the currency of those countries. They are not tangible property, nor do they constitute property within the United States, tangible or intangible (See, *infra*, pp. 7-9).

The respondent bank holds no property for Omar within the United States, nor does Omar have any property rights enforceable in the United States against the respondent. The petitioner wrongly characterizes Omar's hypothetical accounts as being "payable, in the first instance," in the foreign country where respondent's branch does business. On the contrary such accounts would be payable exclusively in the foreign country where the respondent's branch does business. Only if the respondent violates its contractual obligation in the foreign country (as the petitioner would have it do) does any right of ac-

tion accrue against the respondent in the United States, or wherever else the respondent can be found. Such right of action, however, is for breach of contract; it is not to recover property. It is to recover damages for non-performance of contract; not to compel performance (See, *infra*, pp. 14-15).

The court below correctly found that the mere presence of the respondent within the district did not justify the district court in ordering the respondent to deal with property located outside the United States, nor in requiring it so to act outside the jurisdiction as to breach its contractual obligations (See, *infra*, pp. 21-30).

The petitioner's contentions to the contrary are unsound. The district court lacked authority to issue an injunction in a case where it had neither jurisdiction in personam of Omar nor jurisdiction in rem or quasi in rem of Omar's property (See Pet. Br. pp. 12-19; compare, *infra*, pp. 9 to 13). Deposits in foreign branches are specific contractual obligations of the bank to its depositor created and existing under foreign law and constituting property rights entirely outside the United States; neither the depositor nor anyone claiming through him can enlarge these obligations of the bank (See Pet. Br. pp. 24-28; compare, *infra*, pp. 15 to 21). The obligation of the bank to make payment in a particular currency and at a particular place is of the essence of the deposit contract; it is not a mere housekeeping detail which can be disregarded by the depositor or one claiming through him (See Pet. Br. pp. 28-32; compare, *infra*, pp. 20 to 21). Speculation as to the possibility of acquiring jurisdiction in personam over Omar is inappropriate—no factual basis is shown for petitioner's assertions; an injunction may not be used as the equivalent of extradition. (See Pet. Br. pp. 15-23; compare, *infra*, pp. 24 to 26).

The adoption of the novel rule demanded by petitioner would create demonstrable detriment to the banking system and foreign commerce of the United States, and would be adverse to the national interest; this fact found by the court below and attested by the *amici curiae* cannot be offset by petitioner's expostulations. (See Pet. Br. pp. 35-37; compare, *infra*, pp. 31 to 38).

ARGUMENT

I.

Accounts maintained on the books of foreign branches of American banks are contractual obligations created by, existing under, and performable in accordance with, foreign law. They constitute property or property rights within the foreign country which permits the branch to operate. Courts in the United States have no jurisdiction in rem or quasi in rem over such accounts.

The purpose of this proceeding by the petitioner is to seize the property or property rights represented by such accounts as Omar may maintain with foreign branches of the respondent bank. That is the only purpose of this proceeding against the bank. Although the petitioner suggests that it wishes only to freeze, and not to levy upon, this hypothetical property or right, the relief demanded in the complaint is to compel the bank "to return all property and rights to property of . . . Omar, S. A., to the jurisdiction of this Court . . . for enforcement of [petitioner's] lien on said property and rights to property . . ." (R. 8).* Whether

* Petitioner's statement "We stress that this injunction was not equivalent to garnishment, seizure or attachment" (Pet. Br. pp. 11-12) is inconsistent with petitioner's subsequent arguments that "The district court's exercise of jurisdiction over the debt" was proper (Pet. Br. p. 28), and that New York law could not prevent attachment or garnishment in this case (Pet. Br. pp. 29-30).

the petitioner seeks to seize and dispose of this property as upon a levy of execution, or to seize and immobilize the property pending some further action here in the United States, is immaterial. In either aspect, the inescapable reality is that petitioner seeks, through the district court, to exercise dominion over the property or property rights in question.

It is essential, therefore, to have the record show clearly at the outset what kind of property or property right is involved.

A. **A bank account is a contract.** When a bank opens an account for a customer and receives money on deposit for credit to that account, the bank's undertaking is that it will, upon the depositor's special demand, repay to the depositor a like kind and amount of currency at the bank's office where the account is maintained.

> *Leather Manufacturers' Bank* v. *Merchants' Bank*, 128 U. S. 26 (1888)
>
> *The Bank of British North America* v. *The Merchants' National Bank*, 91 N. Y. 106 (1883)
>
> *Chrzanowska* v. *Corn Exchange Bank*, 173 App. Div. 285, 159 N. Y. Supp. 385 (1st Dept. 1916), *aff'd* 225 N. Y. 728, 122 N. E. 877 (1919)
>
> *Gibraltar Realty Corporation* v. *Mt. Vernon Trust Company*, 276 N. Y. 353, 12 N. E. 2d 438 (1938)

The account is to be distinguished from a bailment in which chattels are involved; the account is a contract which confers upon the depositor no rights to any particular asset in the bank's possession. The account creates a debtor-creditor relationship, but that is not a sufficient description of the particular contract, for this debtor-creditor relationship does not imply a general obligation of the

bank but rather a particular obligation, the essence of which is that the bank's duty to pay comes into existence only upon a special demand which must be made at the place of deposit and which must relate to a like kind and amount of currency as that deposited.

B. **A bank account has a situs at the location of the bank or branch where it is maintained.** It is apparent that if a bank account is to be regarded as property, the property exists at the place where the account is maintained and where, under the normal expectations of banker and depositor, it is repayable.

Deutsche Bank Filiale Nurnberg v. *Humphrey*, 272 U. S. 517 (1926)

Zimmerman v. *Hicks*, 7 F. 2d 443 (2d Cir. 1925); *aff'd sub nom. Zimmerman* v. *Sutherland*, 274 U. S. 253 (1927)

McGrath v. *Agency of Chartered Bank*, 104 F. Supp. 964 (S. D. N. Y. 1952), *aff'd per curiam*, 201 F. 2d 368 (2d Cir. 1953)

Sokoloff v. *National City Bank*, 239 N. Y. 158, 145 N. E. 917 (1924); 250 N. Y. 69, 164 N. E. 745 (1928)

Richardson v. *Richardson & National Bank of India, Ltd.* [1927] Probate 228, 137 L.T.R. 492, 163 L.T. 450

Woodland v. *Fear*, 7 E & B 519 (1857)

Rex v. *Lovitt* [1912] A. C. 212 (P. C.)

Martin v. *Nadel* [1906] 2 K. B. 26 (C. A.)

This fundamental rule of reality is emphasized in the case of a bank, such as respondent, which maintains branches throughout the world. In each country where the respondent is permitted by the local sovereignty to do business, it must act responsibly to the laws of the host country.

Local deposits are received and repaid in the currency of that country. Even within the City of New York, deposits at one branch of a bank are repayable only at that branch, notwithstanding the fact that all these branches lie within a single political sovereignty and their deposits are in United States dollars, which are money current at 55 Wall Street as they are at 399 Park Avenue, and at a branch in the Bronx. *Chrzanowska* v. *The Corn Exchange Bank*, 173 App. Div. 285 (1st Dept. 1916), *aff'd* 225 N. Y. 728 (1919). It is of far greater importance to respondent, however, that a deposit made in Japanese yen at its branch in Tokyo implies no obligation to repay pounds sterling at its branch in London, and it is equally clear that the customer who deposits United States dollars at a branch in New York City will not permit the bank to discharge its obligation by tendering him Peruvian soles at its branch in Lima. This Court affirmed the Second Circuit which said in *Zimmerman* v. *Hicks, supra:*

> "We think it plain that (the banks) did not owe a certain number of units of any fixed value, nor could their debts be expressed in any universal currency; they owed only certain quantities of the thing called money within that political subdivision of the world in which the bank existed and to the laws of which it was subject." 7 F. 2d at 445.

C. **The court below properly held that it had no jurisdiction in rem or quasi in rem over accounts in foreign branches.** It is important that the petitioner's brief should not be permitted to obscure the holdings of the court below. The court concluded "that the injunction issued by the district court was beyond its jurisdiction as to deposits held abroad that are collectible only outside the United States." (R. 49). This holding is consistent with the nature of an

account in a foreign branch. The petitioner inaccurately characterizes the court's determination as being relevant to accounts which are "payable, in the first instance," abroad. We shall presently deal in more detail with this forensic device. (*Infra*, pp. 14-15)

At this point, however, we deem it important to emphasize that the decision of the court below relates to deposits at foreign branches which are collectible only outside the United States. Such accounts are inescapably property which has a situs in the country where the foreign branch is permitted to do business.

Petitioner concedes, as it must, that the question of the location of property or property rights, and thus the question of jurisdiction in rem or quasi in rem, must be resolved by reference to the law of New York. Petitioner further concedes, as it must, that under New York law no proceeding in rem or quasi in rem can be maintained in respect of a deposit in the foreign branch of an American bank. Petitioner seeks to escape those conclusions by intimating that perhaps these "local rules" should not control in a federal tax collection proceeding. (Pet. Br. pp. 29-30).* This court, of course, has held precisely to the contrary in *United States* v. *Bess*, 357 U. S. 51 (1958) and *Aquilino* v. *United States*, 363 U. S. 509 (1960).

In its attempt to avoid the consequence of controlling law, petitioner has suggested a novel theory of hitherto un-

* It is to be noted that the petitioner's attitude toward New York law is ambivalent. Petitioner urges with some vigor that Section 302 of the New York Civil Practice Law and Rules relating to the in personam jurisdiction of New York courts is available to confer jurisdiction upon a federal court in an action under a federal statute to collect a federal tax. (Pet. Br. pp. 17-18). With equal enthusiasm petitioner urges upon the court that the long-established New York rule as to the existence or non-existence of property and property rights is a "local rule [which] should not control in a federal tax-collection proceeding". (Pet. Br. pp. 29-30).

stated and uncontemplated creditors' rights. The court below properly rejected petitioner's assertion that the assessment against Omar created a global lien, collectible and enforceable wherever in the world Omar's property might be found. The court said:

> "The Supreme Court has made manifest its reluctance to read an extraterritorial force into statutes when to do so would extend coverage beyond places over which the United States has legislative control [citation omitted] or would interfere with the rights of other nations [citation omitted]." (R. 47).

To suggest that courts in the United States may assert jurisdiction in rem or quasi in rem, or that their process may be effective with respect to such foreign property, is to repudiate the doctrine most recently recognized by this Court in *Banco Nacional de Cuba* v. *Sabbatino,* 376 U. S. 398 (1964).

In *Sabbatino,* this Court was faced with an issue arising out of legislative and administrative acts, allegedly violative of international law, done by the Republic of Cuba within its own territory. The narrow issue was as to whether the courts of the United States should inquire into the validity of these acts, specifically with respect to a certain cargo of sugar which was allegedly the subject of an illegal confiscation in Cuba by Cuba. The court found that the act by which Cuba asserted title to the sugar was a sovereign act effectuated on the property within Cuban territory and that the validity of the act and the effect of the seizure was not subject to question in our courts.

> ". . . we decide only that the Judicial Branch will not examine the validity of a taking of *property within its own territory* . . ." 376 U. S. at 428 (emphasis added).

The application of the principles of international jurisdiction to this action to enforce an *ex parte* tax assessment was cogently put by the court below:

> "The nations of the world have only recently begun to deal with the problem of extraterritorial collection of tax revenues through the medium of negotiated tax treaties providing for mutual cooperation. See Note, International Enforcement of Tax Claims, 50 Colum. L. Rev. 490 (1950). Absent an explicit indication to the contrary, there should not be attributed to Congress an intent to give the courts of this nation, in this highly sensitive area of inter-governmental relations, the power to affect rights to property wherever located in the world. The apparent necessity of tax treaties underscores the conclusion that Congress has seen fit to handle this problem in another manner." (R. 48).

Indeed, petitioner itself has recognized that the acts of a government within its territory do not and cannot affect contractual obligations to be performed elsewhere. In *Pan-American Life Insurance Company* v. *Lorido*, (Nos. 379, 380, October Term, 1963) *cert. den.* 377 U. S. 990 (1964), petitioner submitted a memorandum, at the request of this Court, in which it stated:

> "The principle precluding inquiry by our courts into the validity of foreign acts of state, and requiring the recognition of rights derived from such governmental acts, applies only to acts affecting property or rights within the acting sovereign's territorial jurisdiction."
>
> * * * * *
>
> "The only act of the Government of Cuba which dealt with property or rights located in Cuba was the expropriation of [Pan-American's] Cuban property. This expropriation could not determine [Pan-American's] obligation to perform its contracts with third

parties outside Cuba in circumstances where the contracts provided for performance in places other than Cuba." (pp. 3, 4).

We submit that it is established beyond question that a bank account is a special contract; that this contract constitutes property or rights to property having a situs at the location of the bank, or branch, or agency where the account is maintained; that such property is subject to levy or distraint by the sovereign within whose territory the bank, branch, or agency is maintained; that the laws or process of other sovereigns have no extraterritorial effect and cannot affect property outside their own boundaries; and that these views have consistently been put forward as the policy of the United States and accepted by the courts as the law of the United States. It follows that in the instant case the district court had no jurisdiction in rem or quasi in rem over accounts maintained on the books of the respondent's foreign branches and collectible only abroad.

II.

Neither Omar nor any party claiming through Omar has any right of action against respondent in New York in respect of accounts maintained on the books of respondent's foreign branches.

The obligation undertaken by a bank, at the time an account is opened on the books of one of its foreign branches, is only to repay, in the currency of the account, at the counters of that branch, and upon special demand of the depositor. This obligation is a contract made in, to be performed in, and wholly governed by and enforceable

under the laws of, the host country. It is a creature of foreign law.

In the event that the bank defaults in the performance of its obligation, then the depositor has a remedy, as in the case of any other breach of contract, and this remedy may be asserted against the bank as a unitary institution. It is essential to note, however, that the depositor's remedy arises only upon a breach of the contract of deposit; further, that the remedy is for damages, and not to enforce payment of the debt. Thus, the "deposit" in a foreign branch is never collectible anywhere but at that branch. If the bank should default in its obligation to pay at that branch then a cause of action arises, not to collect the deposit, but to recover damages for breach of the contract.

That cause of action may be asserted against the bank at its home office. The nature of that cause of action, however, must be recognized. Neither the depositor nor anyone claiming through him has any right to enlarge the obligations of the bank by requiring payment at a different place and in a different currency from that specified in the deposit contract.

The place of payment of a deposit contract and the currency in which the deposit is payable are the essence of the contract. An insurance company cannot be obliged to pay death benefits until the insured has died nor to pay the value of a cargo unless the cargo is lost; a trustee cannot be obliged to pay the remaindermen before the life estate has run its course. A merchant who has contracted to deliver coal in Pennsylvania cannot be required to deliver an equivalent value of diamonds in Amsterdam.

The consequence of this proposition is that unless there has been an unexcused default by the foreign branch in

meeting its local obligations, depositors in such branch have no right of action at all against the bank as a unitary institution and the depositor cannot assert a tenable cause of action against the bank at its home office or elsewhere. Finally, as the foreign branch account has its situs at the location of the branch and as the obligation of the bank cannot be enlarged without its consent, the cases uniformly hold that creditors, assignees, successors, or others taking through the depositor, can neither attach nor levy upon such accounts at the head office.

A. **The depositor at a foreign branch has no rights against the bank in New York.** The law recognizes the facts. The right of a depositor in a foreign branch (his "property") is to be repaid at that branch in the currency which he has on deposit with that branch; he has no right to force the bank into an arbitrary foreign exchange contract. Thus, the law, and it is substantive law, has long been clear that a bank is not answerable at its head office on a deposit contract made at a foreign branch, unless that foreign branch has defaulted in its obligation of repayment at its own counters.

It is immaterial whether the foreign branches be treated as if they were separate entities or whether they be regarded as integral parts of a corporate whole. The obligation which the bank, as a whole, undertakes when it opens an account at its foreign branch, is to pay at that branch and at that branch only.

Only where there has been a demand and wrongful refusal at the foreign branch can the depositor maintain an action against the head office. *Sokoloff* v. *National City Bank,* 239 N. Y. 158, 145 N. E. 917 (1924); 250 N. Y. 69, 164 N. E. 745 (1928). Thus, creditors, and others whose

claims derive from the depositor, have no rights against the head office with respect to a foreign branch deposit. The opinion of the court below included an analysis of the "consistent line of authority holding that accounts in a foreign branch bank are not subject to attachment or execution by the process of a New York court served in New York on a main office, branch or agency of the bank." (R. 41-46).* The petitioner's effort to distinguish these cases is futile.

The statements in footnote 13 on page 29 of the petitioner's brief are neither relevant to the legal issue nor are they justified by the record. The uncontradicted evidence in the record is that Omar, S.A. was not known to the bank in New York, and did not have an account at the head office or any domestic branch. (R. 23) The only references to respondent in the petitioner's motion papers are contained in two quotations from the records of brokerage houses, one indicating issuance of a check to respondent (R. 19), the other showing a wire transfer to respondent's Montevideo branch for account of Omar (R. 18). There is absolutely no evidence and no suggestion that respondent in New York played any part in these transfers, or had

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* See *e.g.*, *McCloskey* v. *Chase Manhattan Bank*, 11 N. Y. 2d 936, 183 N. E. 2d 227 (1962); *Varga* v. *Credit-Suisse*, 2 A. D. 2d 596, 157 N. Y. S. 2d 391 (App. Div., 1st Dept. 1956); *Clinton Trust Co.* v. *Compania Azucarera Central Mabay, S. A.*, 172 Misc. 148, 14 N. Y. S. 2d 743 (Sup. Ct., N. Y. Co. 1939), *aff'd without opinion*, 258 App. Div. 780, 15 N. Y. S. 2d 721 (1st Dept. 1939); *Gonzalez* v. *Pardo*, N. Y. L. J. Nov. 30, 1950, p. 1380, col. 5 (Sup. Ct. N. Y. Co., 1950); *Newtown Jackson Co.* v. *Animashun*, 148 N. Y. S. 2d 66 (Sup. Ct. Nassau Co., 1955); *Cronan* v. *Schilling*, 100 N. Y. S. 2d 474 (Sup. Ct. N. Y. Co. 1950); *Walsh* v. *Bustos*, 46 N. Y. S. 2d 240 (City Ct., N. Y. Co. 1943); *Bluebird Undergarment Corp.* v. *Gomez*, 139 Misc. 742, 249 N. Y. Supp. 319 (City Ct., N. Y. Co. 1931).

These cases are entirely consistent with 12 U. S. C. 604, which requires respondent to "conduct the accounts of each foreign branch independently of the accounts of other foreign branches established by it and of its home office."

any knowledge that they were made. And this is so, even if these transfers were made through respondent's head office (and there is nothing in the record to suggest this was the case) because the remitting bank was acting for Lehman Bros. and Lazard Freres and not for Omar. (See *Erb* v. *Banco di Napoli*, 243 N. Y. 45; 152 N. E. 460 (1926); 7 Zollman, Banks and Banking, Section 4753).

The Second Circuit accurately recognized that the doctrine enunciated in the New York cases is founded upon sound policy justifications, and quoted with approval the opinion in *Cronan* v. *Schilling*.

> "Unless each branch of a bank is treated as a separate entity for attachment purposes, no branch could safely pay a check drawn by its depositor without checking with all other branches and the main office to make sure that no warrant of attachment had been served upon any of them. Each time a warrant of attachment is served upon one branch, every other branch and the main office would have to be notified. This would place an intolerable burden upon banking and commerce, particularly where the branches are numerous, as is often the case." *Cronan* v. *Schilling*, 100 N. Y. S. 2d 474, 476 (Sup. Ct., N. Y. Co. 1950) (R. 43).

B. **The petitioner can only exercise the rights of Omar.** The purpose of this action is to seize property of Omar in satisfaction of taxes assessed against Omar. Any rights or claims which petitioner has or asserts against respondent necessarily derive from Omar. Consequently the case presents a typical illustration of a proceeding to distrain property of a defendant in the hands of a third party, whether the order the court issues is labeled attachment, garnishment, levy, execution, capias in withernam, or injunction. The petitioner has conceded that the relief it

seeks in this action "is the federal tax statute's analogy of garnishment and attachment. *United States* v. *Eiland*, 223 Fed. 2d 118, 121 (4th Cir. 1955)." (Pet. Main Brief in Court of Appeals, p. 20).

Harris v. *Balk*, 198 U. S. 215 (1905), upon which the petitioner places great and misplaced emphasis, clearly demonstrates that the right of garnishment is dependent upon the right of the primary creditor to bring action against the garnishee-debtor at the place of garnishment.* The obligation of the garnishee-debtor is not enlarged by the garnishment and a defense of the garnishee-debtor which would be good against its creditor is a good defense in the garnishment proceedings. The court of appeals correctly applied *Harris* v. *Balk* when it observed that:

> "The nature of garnishment proceedings is such that the garnishor obtains no greater right against the garnishee than the garnishee's creditor had. [citations omitted]. Thus, only if Omar could sue [respondent] in New York to recover his deposit, can the Government, as Omar's creditor, sue in New York." (R. 40).

It is clear in the instant case that Omar has no right against the respondent in New York. The obligation, if any, which the bank undertook with respect to Omar was to pay foreign currency at a foreign branch; this obligation

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* This rule and this interpretation of *Harris* v. *Balk* represent the law today. *The Copperfield*, 7 F. 2d 499 (S. D. Ala. 1925), *aff'd, sub nom. Aktieselskabet Dea* v. *Wrightson*, 26 F. 2d 175 (5th Cir. 1928), *cert. den.* 278 U. S. 623 (1928) and *Schlaefer* v. *Schlaefer*, 112 F. 2d 177 (D. C. Cir. 1940) (dictum), cited by petitioner at pages 27-28 of its brief, neither alter nor erode the principle. In *The Copperfield*, the court's decision was based, *inter alia*, upon a state statute which expressly authorized the proceeding,—in contrast to New York law which unequivocally prohibits this proceeding. In *Schlaefer*, the determinative reason for the court's decision was that all parties had appeared and submitted to the jurisdiction of the court.

is not enlarged because the respondent is found in New York. The petitioner is totally wrong in its assertion (Pet. Br., pp. 26-28) that an attaching creditor can sue the garnishee-debtor wherever he can be found.

C. **The petitioner has no right to alter and enlarge the obligation which respondent has undertaken to its customer.** Reduced to its essential brutality, the petitioner's demand is that the bank make payment to it in New York whether or not the bank would be obliged so to make payment to Omar. That respondent holds in New York no *res* belonging to Omar is clear. That Omar has no right to claim payment in New York of any hypothetical debt created by a deposit at one of the respondent's foreign branches is equally clear.

The fact that the petitioner is the Government does not create any substantive rights; it does not alter or expand the respondents' obligation. It may well be that federal law can give to the Government a remedy where no remedy is available to a private citizen but federal law cannot create property in New York when none exists here; and the demands of Government, however ruthlessly pressed, cannot impose upon the respondent an obligation which the respondent never undertook. "It would be most unfair that a third person, merely by reason of his interposition, whether he was a sovereign or not, should be able to change the rights inter sese between the obligor of the chose in action and his obligee, who is the objective of the levy or attachment." *United States* v. *Bank of United States*, 5 F. Supp. 942 (S. D. N. Y. 1934).

In the words of Mr. Justice Holmes:

> "A suit in this country is based upon an obligation existing under the foreign law at the time when

> the suit is brought, and the obligation is not enlarged by the fact that the creditor happens to be able to catch his debtor here." *Deutsche Bank Filiale Nurnberg* v. *Humphrey*, 272 U. S. 517, 519 (1926).

It must be noted, too, that in the particular circumstances presented in this case the petitioner's effort to enlarge the obligations of the respondent will result in exposure of respondent to multiple liability. For a more extensive discussion of this factor, see *infra*, pp. 26-30.

In the face of all relevant authority, the petitioner has persistently maintained that it can rise above the substantive limitations upon the rights of allegedly delinquent taxpayers against third parties, and in support of that proposition the petitioner evidently considered one case so convincing as to warrant its reproduction in full in an appendix to its reply brief on petition for certiorari in this case. That case, *Equitable Life Assurance Society of U. S.* v. *United States*, 331 F. 2d 29 (1st Cir. 1964), also cited at pages 24 and 30 of petitioner's brief on the merits, is in fact firm authority for our contention that the petitioner cannot vary the substantive terms of the respondent bank's obligations towards Omar. In the *Equitable* case the First Circuit found that the Government's tax lien could be enforced against the cash surrender value of a life insurance policy notwithstanding the taxpayer's refusal to surrender the policy—a condition precedent to the taxpayer's right to claim the cash surrender value. The court noted, however, that:

> "The provisions for physical surrender of the policy in connection with obtaining the matured value is a mere housekeeping matter to permit the company to tidy up

its affairs. . . . *This is not to voice disagreement with the principle that in matters of substance the government's lien cannot rise above the rights of the taxpayer.*" 331 F. 2d at 33. (emphasis added)

As we have repeatedly pointed out, and as the court of appeals held in this case, the essential characteristics of a bank account are that it is an undertaking that the bank will, upon the taxpayer's special demand, repay to the depositor a like kind and amount of currency at the bank's office where the account is maintained. These are not mere housekeeping details but are the very substance of the bank's contractual obligation; they may not be varied at the option of third-party creditors of the bank's customer, whether those creditors be tax-collectors or tradesmen.

III.

The presence of the respondent within the district confers no equitable jurisdiction upon the district court to enjoin the respondent from the performance of obligations lawfully incurred and performable by it in foreign countries.

There is no real issue as to the fact that the foreign branch accounts are property with a situs in a foreign country which provide the district court with no jurisdiction in rem or quasi in rem. On this point, the issue lies between the executive and the judicial branches of government, for neither the district judge nor the judges who joined in the dissent below accepted petitioner's argument that these accounts were property subject to levy in the United States. Neither is there any question at all that petitioner asserts no claim in personam against respondent.

This case really reduces therefore to the question, whether the court may use the provisional remedy of injunction when it has no jurisdiction to enter a final order of distraint.*

A. **The equitable remedy of injunction may only be used to achieve an equitable result.** We do not dispute that the court has power over the bank's head office. But power must not be equated with authority. A federal court exercising the extraordinary powers of equity has no right to use those powers toward an improper end.

> "There is no power the exercise of which is more delicate, which requires greater caution, deliberation, and sound discretion, or more dangerous in a doubtful case, than the issuing an injunction; it is the strong arm of equity, that never ought to be extended unless to cases of great injury, where courts of law cannot afford an adequate or commensurate remedy in damages. The right must be clear, the injury impending or threatened

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* An injunction anticipates, but cannot exceed, the ultimate sanction which the court is authorized to impose. The extraordinary power of a district court to issue preliminary injunctions should only be exercised upon a showing that the prospect of the applicant's ultimate success is so great that the ultimate sanction of the court may be accelerated.

Hall Signal Co. v. *General Ry. Signal Co.*, 153 Fed. 907 (2d Cir. 1907);

Yonkers Raceway v. *Standardbred Owner's Ass'n.*, 153 F. Supp. 552 (S. D. N. Y. 1957);

Nadya, Inc. v. *Majestic Metal Specialties*, 127 F. Supp. 467 (S. D. N. Y. 1954).

In none of the approximately 50 cases we have found which cite *Hall*, culminating in *H. E. Fletcher Co.* v. *Rock of Ages Corp.*, 326 F. 2d 13 (2d Cir. 1963), is there dissent from its holding that:

> "It is a cardinal principle of equity jurisprudence that a preliminary injunction shall not issue in a doubtful case. Unless the court be convinced with reasonable certainty that the complainant must succeed at final hearing the writ should be denied." 153 Fed. at 908.

> so as to be averted only by the protecting preventive process of injunction; but that will not be awarded in doubtful cases, or new ones, not coming within well established principles; for if it issues erroneously, an irreparable injury is inflicted, for which there can be no redress, it being the act of a court, not of the party who prays for it". *Bonaparte* v. *Camden*, 3 Fed. Cas. 821, 827 (No. 1617) (C. C. N. J. 1830).
>
> See also, In re *Dunkly*, 64 F. Supp. 184 (N. D. Cal. 1946).

The relief sought by the petitioner against the bank is unprecedented and excessive. The effect of petitioner's demands would be to invoke the equity power of the district court to force a bank into service as an uncompensated international marshal and to send it on an overseas mission in aid of the Internal Revenue Service's extra-territorial adventures. Consider the example, distressingly similar to the facts at bar, of "a simple order, confined to a direction to [the bank]" (R. 50) to have its foreign branches seize Omar's officers anywhere in the world should they appear at the counters of the branch and to hold those officers until Omar pays its taxes. While the court may have the power to compel such a perversion of due process, presumably by incarcerating all the bank's officers found in New York, no one can deny this would be an improper use of an equitable remedy.

In this case, the petitioner seeks to conscript the bank for performance abroad of acts on behalf of the petitioner which the petitioner cannot itself perform. It seeks to impose this servitude by invoking the district court's power over officers of the bank located in New York, heedless of the penalties which will be imposed in the countries in which

the acts are to be performed. See, *infra*, pp. 26-30. This is an abuse of equitable power:

> "We realize that a court of equity having personal jurisdiction over a party has power to enjoin him from committing acts elsewhere. But this power should be exercised with great reluctance when it will be difficult to secure compliance with any resulting decree or when the exercise of such power is fraught with possibilities of discord and conflict with the authorities of another country". *Vanity Fair Mills* v. *T. Eaton Co.*, 234 F. 2d 633, 647 (2d Cir., 1956).

The argument made by the petitioner with respect to its ability to secure in personam jurisdiction over Omar is both premature and inappropriate. It is immaterial whether or not Omar is before the court.* Even if Omar had appeared in this action or otherwise acquiesced in the jurisdiction of the district court, it would be inappropriate to use the equitable powers of the court to alter or enlarge the obligation undertaken by the respondent. It is not necessary, however, to deal with this question for the fact is that neither at the time the injunction was issued nor at the present time does the district court have jurisdiction over the person of Omar.

The petitioner has set forth a fanciful array of theories as to how it may, at some future date, be able to acquire in personam jurisdiction of Omar. In essence the petitioner reaches for a section of the New York Civil Practice Law and Rules which became effective September 1, 1963, nearly a year after the issuance of the order in question. We have

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* The court of appeals found that Omar's absence was significant, but only in terms of distinguishing one case, *United States* v. *Ross*, 302 F. 2d 831 (2d Cir. 1962) (Pet. Br. p. 11). Omar's absence was not, as petitioner suggests, the *sine qua non* of the decision.

no indication that any steps have actually been taken in reliance upon this statute. The application of this state law, describing the in personam jurisdiction of state courts over non-domiciliaries of the state, is questionable indeed in its reference to the case at bar, which is an action in a federal district court brought under a federal statute for the purpose of collecting a federal income tax from a party who is not only a non-domiciliary of the state in which the district court sits but is a non-resident alien of the United States. Basic questions exist as to the availability of this statute to the Internal Revenue Service in a case such as the one at bar and indeed as to the constitutionality of the state statute itself in its application to a non-resident alien of the United States. We note in passing that such decisions as *McGee* and *International Shoe** were in cases in which the defendant was a resident of the United States; in other words, any expansion of state jurisdiction has occurred within the framework of our federal system where the judgment of each state is entitled to full faith and credit in the courts of every other state. The situation is critically different where the Law of Nations and comity are to be applied, rather than the internal laws of a federal union, bound by the mandate of full faith and credit.

Nevertheless, it is quite evident that even if the district court should assert in personam jurisdiction over Omar by reason of the New York "long-arm" statute or some other legal fiction, it would still be unable to enforce its decree against Omar. Further, as it cannot enforce its decree against Omar, it cannot protect the respondent against multiple liability in other jurisdictions. This inability to pro-

* *McGee* v. *International Life Insurance Co.*, 355 U. S. 220 (1957); *International Shoe Co.* v. *Washington*, 326 U. S. 310 (1945).

tect its own decree and to protect innocent parties such as the respondent, who may act in accordance therewith, distinguishes the case at bar from *United States* v. *Ross*, 302 F. 2d 831 (2d Cir. 1962), and similar cases relied upon by petitioner.

B. **A court of equity will not make a decree which it cannot enforce nor will it require performance when it cannot protect those who act in compliance with its order.** The injunctive power should be severely restricted when it is used against a party other than a principal actor. See *Eighth Regional War Labor Board* v. *Humble Oil and Refining Co.*, 145 F. 2d 462 (5th Cir. 1944), *cert. den.* 325 U. S. 883 (1945). In cases upon which the petitioner has evidently relied it must be noted that the party required to perform an act beyond the jurisdiction of the court was the very party against whom affirmative substantive relief was requested. Compliance with such an order created no possibility of the imposition of double liability on the actor. In the case at bar, the petitioner's assertion that if respondent "complies with the district court's order, respondent . . . will presumably incur no liability" (Pet. Br. p. 33) can only be regarded as frivolous. The petitioner presumes that the court's order will be a "recognized defense" to an action by the depositor for breach of the deposit contract (*loc. cit. supra*). In Appendix A hereto we set forth opinions of counsel in six countries where the bank maintains branches. These opinions of counsel in London, Paris, Milan, Montevideo, Bogotá and Mexico City, which were before the court below, all show that the district court's order would not constitute a defense to an action against the bank in those localities.

The district court recognizes, indeed the petitioner admits, that the respondent cannot properly be required to engage in a violation of law in the countries where its foreign branches are permitted to do business. Whether this violation of law results in a criminal or civil liability is immaterial. To be mulcted in damages may be more painful than to pay a small fine; a reprimand or suspended sentence may be insignificant when set against the loss of a reputation for integrity in business built up over many decades.

The mere possibility of multiple liability is sufficient warrant for denial of the injunction. In *Martin* v. *Nadel* a judgment creditor sought a garnishee order against the London branch of a German bank on the ground that a deposit with the Berlin branch was a debt due from the bank to the judgment debtor. The court stated:

> ". . . It appears to me to be clear that a garnishee order is of the nature of an execution, and is governed by the lex fori; and by international law an execution which has been carried into effect in a foreign country under foreign law, and has taken away part of a man's property, is not recognized as binding. There can be no doubt that under the rules of international law the Dresdner Bank could not set up, in an action in Berlin, the execution levied in this country in respect to this debt. If we consider the converse case it is clear, to my mind, that we should take that view of a similar transaction occurring abroad.
>
> • • • • •
>
> ". . . I must therefore decide this case on the ground that it would be inequitable to order the bank to pay the money to the execution creditor when that payment would leave them still liable to an action to recover the same debt brought in a competent Court at the

foreign place where the parties reside." *Martin* v. *Nadel*, [1906] 2 K. B. 26, 29, 30 (C. A.).

That decision has been approved and followed in the two American cases we have found dealing with American garnishees and possible double liability in a foreign country. See 69 A. L. R. 610 (1930). In *Weitzel* v. *Weitzel*, 27 Ariz. 117, 230 Pac. 1106 (1924), a wife tried to garnishee her husband's employer, the Southern Pacific Railway Company of Mexico, which had offices in Arizona, in order to reach a debt it owed to her husband for wages he earned in Mexico. The employer objected on the ground of possible double liability. The court stated:

> "... While it is probable the Mexican courts would take notice of a payment of the debt in Arizona and refuse to compel a second payment, there is no international rule, or law, or treaty, so far as we know, requiring that they give faith and credit to judgments of this country's courts.
>
> • • • • •
>
> "... It seems to us, since the services were all rendered in the Republic of Mexico for a corporation whose plant is entirely in that country, and since the debt was made and payable therein, the company ought not to be compelled to pay such debt to an Arizona creditor when it is not only possible but probable it would have to pay it again." 230 Pac. at p. 1108.

See also, *Parker, Peebles & Knox* v. *National Fire Ins. Co.*, 111 Conn. 383, 150 Atl. 313 (1930).

Nor does it matter that the claimant is the Internal Revenue Service seeking to levy on a debt owed to a delinquent taxpayer. In *United States* v. *Winnett*, 165 F. 2d 149 (9th Cir. 1947), the court stated: "The equities in this case are clearly with Winnett [the garnishee]. He should not be

required to pay the same debt twice even though the interposition here is by the sovereign." 165 F. 2d at p. 151.

The district court cannot protect the bank against multiple liability. Outside the United States the decrees of the district court are not entitled to full faith and credit. It is a rule of international law, accepted and enforced in the United States, that the courts of one country will not enforce or give effect to the tax claims of another. Thus, the decree of the district court is not entitled to comity among nations, let alone full faith and credit.

A recent Canadian case sharply illustrates the limitations on the petitioner's right to extra-territorial enforcement of its revenue laws. *United States* v. *Harden* involved a suit in British Columbia by our Government upon a tax judgment rendered by the United States District Court for the Southern District of California. Action had been brought by the Government in that court under assessments of the Commissioner of Internal Revenue. The defendant appeared and answered. A settlement was reached before trial and the defendant consented to the entry of a formal judgment in the amount of $602,110.79. The Government brought an action on that judgment in the Supreme Court of British Columbia and the defendant moved to dismiss on the ground that the court had no jurisdiction to enforce directly or indirectly the revenue laws of a foreign state. The motion was granted and unanimously affirmed by the British Columbia Court of Appeal, and then was unanimously affirmed by the Supreme Court of Canada. *United States of America* v. *Harden*, [1964] D. L. R. 2d 721, [1963] Can. Exch. 336 (63-2 U. S. T. C. ¶9768).

The principle that the courts of one country will not enforce or give effect to the fiscal or penal claims of other countries is a rule of international law which is a part of the law of the United States.

> *Banco Nacional de Cuba* v. *Sabbatino*, 376 U. S. 398, 413-14 (1964).
>
> *Banco do Brasil, S. A.* v. *A. C. Israel Commodity Co., Inc.*, 12 N. Y. 2d 371, 190 N. E. 2d 235 (1963), *cert den.*, 376 U. S. 906 (1964).

The susceptibility of a party to punishment does not justify a court in abusing its equity powers. Unquestionably, the respondent is present within the Southern District of New York. It is equally clear that the real defendant, Omar, is not present within the district, that Omar has no property or rights to property within the district or the jurisdiction of the district court, and that compliance by the respondent with the order of the district court would expose it to liability abroad, to which the order of the district court would not be a defense. In these circumstances, it is clear that the district court had no right to issue an injunction. As the court below said (R. p. 40):

> "*Hanson* v. *Denckla*, 357 U. S. 235 (1958) made explicit what had been assumed since *Pennoyer* v. *Neff*, 95 U. S. 714, 733 (1877), namely, that a state has no right 'to enter a judgment purporting to extinguish the interest of such a person [over whom it has no personal jurisdiction] in property over which the court has no jurisdiction,' 357 U. S. at 250." (R. 40).

The court of appeals properly held that the district court could not, through the device of a provisional remedy, achieve a result proscribed by this Court in *Hanson* v. *Denckla*.

IV.

The decision of the court below comports with sound reason and public policy. The arrogation of power demanded by the petitioner would cause irreparable damage to the banking system and foreign commerce of the United States with no compensating benefit to the Internal Revenue Service.

The petitioner does not and cannot deny that this case evidences the first effort to enforce tax penalties against a non-resident foreigner by distraint on accounts maintained at the foreign branches of a United States bank. The petitioner does not and cannot deny that the novel procedure would damage the banking system; it attempts only to persuade the Court that the hurt will not be intolerable.

The fact is that to indulge petitioner in its demand for extra-territorial powers would cause irreparable damage to the national interest. The area of damage extends beyond the immediate interest of the banks. A declaration that United States courts will cause the "freezing" of deposits in the foreign branches of American banks would unmistakably seriously impair, if not destroy, the ability of United States banks to compete abroad; to the extent that the "freezing" program was implemented, American banks would be subjected to loss consequent upon the breach of their contractual obligations in foreign countries; it would result in a withdrawal of foreign currency deposits which inescapably would cripple the ability of American banks to finance the foreign commerce of the United States; it would thus immediately and adversely affect the United States balance of payments; it would necessarily open the door to invasion of the sovereignty of the United States through the assertion of corresponding rights by foreign

governments; and, perhaps worst of all, it would degrade the reputation of the United States as a nation operating under law rather than expediency.

The record is devoid of facts, or even optimistic speculation, as to the volume of money which might, through the use of petitioner's proposed new device, flow into the coffers of the United States, whether from the pockets of delinquent taxpayers or of innocent banks. It is evident, however, that in precise measure as our government impairs the ability of American banks to attract and maintain foreign currency deposits, the practical possibility of collection will diminish. Indulgence of petitioner's demands would not only be bad law, it would be a bad bargain.

A. The court below correctly assessed the policy issue. Examining the position urged by the petitioner, the court below came to the reasoned conclusion that it would "lead only to harmful consequences for our banking system abroad without any concomitant benefits here at home", (R. 48). There can be no doubt that adoption of the proposal urged by the petitioner would have serious adverse effects upon the American foreign banking system and thus upon the foreign commerce of the United States which that system serves. The area and depth of this detriment is evidenced by the concern which has led the respondent's American competitors to appear as *amici curiae*; it has been reflected by the dismay of those concerned with the well-being of the American commercial community.*

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* "The future of American foreign banking is more important than collection of a few million dollars of somebody's delinquent taxes—if indeed they ever can be collected."

Editorial, The Journal of Commerce and Commercial (New York, N. Y., June 11, 1964).

B. **The only significance of the new Treasury regulations is that they evidence recognition of the harm to the banking system.** In apparent recognition of the injurious effects on the foreign banking community of the use of process here to reach accounts abroad, the Treasury announced new regulations relating to the collection of taxes "from any deposits held in a foreign office of a bank engaged in the banking business in the United States". These regulations were announced on the day the petition for certiorari was filed in this case. They assume a power which, so far, the courts have uniformly held the Commissioner of Internal Revenue does not have; and they were promulgated in evident defiance of the decision of the court of appeals in this case.

These regulations purport to be a self-imposed restriction upon the use of process to reach foreign bank accounts to collect taxes; and they are now put forward by the petitioner as justification for the extraordinary remedy pursued in this case, apparently for the first time.

Every tax levy contains an injunction and, so far as intangibles are concerned, a tax levy can only be enforced against a third party by enforcement of the injunction. Chaos would result, if every tax levy served on a bank with foreign branches were to apply to deposit accounts maintained all over the world.* This is so evident that the regulations would limit the use of process against foreign bank accounts to those cases where the Commissioner believes (1) that the taxpayer is within the jurisdiction of the court at the time the action is authorized or sanctioned,

* The respondent alone is served with approximately 2,000 Federal tax levies each year.

or (2) if the taxpayer is not within the jurisdiction of a United States court at that time, that the foreign deposits "consist, in whole or in part, of funds transferred from the United States . . . in order to hinder or delay the collection of a tax . . ." Treasury Regulations on Procedure and Administration (1954 Code), 26 C. F. R. §§ 301.6332-1, 301.7401-1.

The significance of the Regulations lies in the fact that they evidence an awareness of the injury to the American banking system inherent in the position for which the petitioner contends; moreover, they indicate an awareness of the disadvantage to the national interest, for the foreign branch banks in question are not only those of American banks, but the foreign office of any bank doing business in the United States. The restraint which the petitioner is prepared to impose upon itself in the exercise of the power it requests is most certainly not dictated by concern for the tax delinquents whom it pursues. The concern can only be for the damage done to innocent and productive United States interests.

The Regulation, however, is entirely inconsistent with principle. Quite obviously, the validity of the permissive sections of the regulation depends upon the concept that courts in the United States have the power to reach foreign deposits, whether that power is named attachment, garnishment, execution, levy, injunction, or as the petitioner characterizes it, "freezing". If this power does exist, then it is difficult to see why it should not be exercised in respect of any tax delinquent. If, as we contend, it does not exist, then vitality cannot be breathed into it by reason of the tax delinquent's intent to frustrate the tax collection process.

It is to be noted that the Regulation reflects the argument made in petitioner's brief to the effect that the injunctive power is necessary in order to prevent the dissipation of the delinquent's assets by their removal beyond the power of the United States. The fact is that once the assets have been removed, they are outside the jurisdiction of the United States and beyond the grasp of the tax collector. The fact that the delinquent taxpayer thereafter establishes an account and makes deposits in the foreign branch of an American bank, rather than in the foreign branch of a local or other non-United States bank, has nothing to do with the exodus of assets from the jurisdiction.

No one can quarrel with the concept that the Treasury should have plenary rights to prevent a non-resident tax delinquent from removing dollars or other property from the United States; indeed, such powers now existing within the scope of law were properly and effectively exercised in the case at bar to "freeze" accounts with Lehman Bros. and Lazard Freres in New York City. The problem is that the petitioner would equate the power to arrest with the power to extradite, if the fugitive asset, or its proceeds, is at some time believed by the Commissioner to be found in a foreign branch of an American bank.

The petitioner is obliged to recognize (Pet. Br. p. 7) that the proposed Regulation had no application to the case at bar; it is quite frankly put forward as a palliative for the injury which petitioner recognizes will ensue from the exercise by it of the power it seeks. A promise to use self-restraint in the future is offered to the court by the petitioner as a sort of bargain to persuade the court to grant power where it has never existed before. It is not sufficient here. So long as the United States asserts the right to

sequester property in the foreign branches of American banks whenever an official in Washington believes it is appropriate to do so, the competitive disadvantage to the American banks, the starvation of the financial arteries which nourish American foreign trade, and the pressures on the United States balance of payments will continue. The deal which the petitioner has offered in these regulations is not acceptable. Even if it mitigates the injury to the national interest in some particulars, what remains is insupportable. The position urged by the petitioner, even diluted by the new Regulation, is adverse to the national interest. The injury, in the words of mortally wounded Mercutio, may be "not so deep as a well, nor so wide as a church door, but 'tis enough . . ."

C. **The deposit gathering function of the foreign branches is of vital importance to the United States economy.** The foreign branches of American banks are recognized as important participants in the international economic policy of the United States. They facilitate the foreign trade and commerce and investment of the United States through the provision of financial services and through financing American business overseas by loans and credits. The most vital aspect of their operations is their unique ability to assemble local capital for these purposes instead of depending upon an outflow of United States capital. The local deposits of these branches defend the international position of the United States dollar. The foreign branch must have a source for the funds which it uses in its business. If it is handicapped in its ability to obtain these funds through the medium of local deposits, it must tap the United States dollar capital of the bank as a whole, or it must go out of business.

D. **The frivolous use of injunctive power does irreparable damage to the bank.** Quite apart from any loss of existing deposits or inability to compete for new deposits, the application of the court's injunctive power with respect to deposits at foreign branches will result in an immediate loss to the bank which cannot be less than the amount of the deposit but may run into extended consequential damages. We must confess that, long range, this damage to the banks will probably be minimized because the threat occasioned by reversal of the instant decision will inevitably eliminate from the books of the foreign branches not only those persons who are, but those persons who might conceivably be, delinquent in acceding to the tax demands of the United States. Thus with the disappearance of the deposits which the petitioner seeks to distrain there will undoubtedly be a corresponding lessening of the bank's exposure.

E. **Reversal of the decision below would involve repudiation of fundamental judicial policies.** The court below recognized that "the rule suggested by the Government would have to work both ways . . . it is inconceivable that the issuance of an injunction by a court of a foreign country against an American branch bank affecting the accounts or activities of the head office in the United States would be looked upon with favor." (R. 48-49). It is a fundamental judicial policy, in the United States as in other countries, that the courts will not enforce or give effect to the fiscal or penal claims of other countries. Yet, adoption of the rule urged by petitioner would mean that the taxing authorities of Lebanon could "freeze" the account of a United States citizen at respondent's head office in New York City, by serving upon respondent's branch in Beirut an order directing such action. It must be noted, too, that

this result would obtain even though the United States citizen had never set foot in Lebanon; under the rule urged by petitioner, the *ex parte* assessments of the Lebanese Government would have to be treated as a "global lien" intruding upon the sovereignty of the United States.

Conclusion

The hope of temporary advantage in the pursuit of a single claim should not outweigh fundamental principles of law long established to safeguard fair dealing. Those who use the strong arm of equity against a malefactor must be sensitive lest it injure the innocent.

THE JUDGMENT OF THE COURT OF APPEALS FOR THE SECOND CIRCUIT SHOULD BE AFFIRMED.

Respectfully submitted,

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SHEARMAN & STERLING
WM. HARVEY REEVES
HERMAN E. COMPTER
JOHN E. HOFFMAN, JR.
Of Counsel

September 25, 1964

APPENDIX A

At our request, a number of First National City Bank's foreign branches submitted the following question to local counsel for an opinion under the laws of the host country:

> "Assume that the local branch of First National City Bank refuses to honor the demand of a depositor for payment of the credit balance in his account, and that the depositor brings an action against the bank for such refusal:
>
> 1. Would the courts of [name of country] recognize as a defense that the refusal to pay was based upon an injunction order issued by a court in the United States?
>
> 2. Would your answer be affected if the injunction order were issued in an action brought by the United States to collect taxes from the depositor?"

The branches solicited were the following:

London
Paris
Milan
Montevideo
Bogotá
Mexico City
Karachi

There follow the opinions received from all branches except Karachi. These opinions were before the court of appeals on the en banc rehearing.

Karachi had not responded by the time of the rehearing. Since an opinion of Pakistani counsel would go beyond the material before the court of appeals we did not consider it appropriate to follow up the inquiry to Karachi.

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YOUR REF
OUR REF WLA

30th September, 1963.

R.J. Breyfogle, Esq.,
First National City Bank,
117, Old Broad Street,
London, E.C.2.

Dear Bob.

Thank you for your letter of the 27th of this month enclosing a copy of the letter dated 25th of this month from your head office.

The question to which an answer is required is supposing you refused to honour a cheque drawn on your Bank by one of your customers who had a credit balance would it be a defence to you if the Courts in this country to say that you had refused payment because of an injunction issued by a Court in the United States.

The answer to this question is that the contract between you and your customer is an English contract and the debt owing by the Bank to the customer in respect of his credit balance is situated in this country and in these circumstances the relationship is governed by English Law and the decrees of a Foreign Court in no way affects the position. This means that it would not be a good defence to you to plead the injunction of a Court in the United States.

I think that what I have written above covers the situation but a further question is posed in the letter of September 25th, namely, would the answer be in any way affected if the injunction order were issued by a Court in the United States to collect tax from your customer. The answer here again is in the negative. In any event the Courts in this country will not directly or indirectly enforce the Revenue Laws of a Foreign country.

I hope that what I have written will be of assistance to you.

Yours sincerely,

William L. Addison

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October 1, 1963

PRIVATE & CONFIDENTIAL

Mr. Harvey S. Gerry
First National City Bank
60, Avenue des Champs-Elysées
Paris - 8.

Dear Mr. Gerry,

This refers to the letter dated September 25, 1963 from Mr. Frank T. Mitchell of your main office to you, copy of which was forwarded to me.

The said letter inquires first as to whether the Paris branch could successfully argue in a French court that it refused to honour the demand of a depositor for payment of a credit balance in his account on the ground that such refusal to pay was based upon an injunction order issued by a court in the United States. The answer to this question is no.

Under French rules of private international law, an injunction order issued by a foreign court whether during the course of an action (what is known in American law as a "preliminary injunction") or as a result of a judgement must be subject to the procedure called "Exequatur" in order to be enforced in France. This involves in all cases an application by the foreign party concerned to a French court for such enforcement in France.

/cont...

It follows from the foregoing, therefore, that the Paris branch of your bank cannot block the account of a depositor so as to satisfy an injunction order by a foreign court unless and until such order has been expressly sanctioned by a French court and notice thereof duly given to your branch according to the rules of French procedure.

The second part of the inquiry contained in the afore-mentioned letter pertained to whether our answer to the first question would be different if the injunction order were to be issued in an action brought by the United States Revenue Authorities to collect taxes from the depositor. The answer to this question is also in the negative. The identity of the plaintiff does not affect the reasoning outlined above.

Very truly yours,

Henry Archibald.

JBG/tb

FIRST NATIONAL CITY BANK

OVERSEAS INTER-OFFICE AIR MAIL LETTER

Private & Confidential

From: MILAN
Casella Postale 4078
Milano, Italy

To: Mr. F.T. Mitchell, Senior Vice President and
Office: Deputy Manager Overseas Division
Head Office, New York.
Re:

Date: October 1,1963

In replying please quote: PHA/lm

RECEIVED
OCT 3 1963
F. T. MITCHELL
OVERSEAS DIVISION

Reference is made to your letter of September 25, 1963. The questions set forth in the above letter have been answered by our counsel as follows:

""1) An Italian Court could not recognize as sufficient motive to refuse payment the injunction order issued by a U.S. Court;

2) The reasons for which the injunction order was issued could not affect the answer given above.""

Paul H. Austin
Manager

ESTUDIO JURIDICO
GUYER & REGULES
FUNDADO EN 19?? POR LOS DRES. MAX GUYER Y DARDO REGULES
DIR. TELEG. GUYERMAX
TELEFS. 84125 - 84859 - 9?193
EDIFICIO ARTIGAS RINCON 487
MONTEVIDEO URUGUAY

September 30, 1963

M E M O R A N D U M

Re: Letter dated September 25,1963
Mr. Frank T. Mitchell to
Mr. Harold M. Weaver, Jr.

1) No.- An injunction order issued by a U.S. Court is not applicable in Uruguay unless the injunction is properly submitted and approved by the Suprema Corte de Justicia of Uruguay following the legal requisites required by Uruguayan law.-

2) No.- It is irrelevant the person of the plaintiff and the origin of the debt.-

Gilberto Regules

lg

PAYAN CAMARGO & CIA.
ABOGADOS

SOCIOS:
BERNARDO PAYAN CASTRO
ALVARO CAMARGO PAYAN

ABOGADOS CONSULTORES:
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LORENZO SOLANO PELAEZ
RAUL MUÑOZ PISBRANITA
ERNESTO ESCALLON VARGAS
JOSE MARIA IRAGORRI V.

OFICINAS EN EL EDIFICIO DEL BANCO DEL COMERCIO
CALLE 19 No. 8-52 - 8o. PISO
BOGOTA, COLOMBIA

APARTADO AEREO 4305
CABLES: "PAYCAM"
TELEFONOS: 41-84-37, 41-72-84, 42 82 3

ANSWER TO POINT 1.

Colombian Courts would not recognize this defense unless the injunction order issued by an American Court has been in turn confirmed by the Colombian Supreme Court, after having followed proper legal procedure to obtain enforcement of a foreign judicial decision.

ANSWER TO POINT 2.

The origin of the injunction does not in any way affect our answer.

PAYAN, CAMARGO & CIA.
ABOGADOS

GOODRICH, DALTON, LITTLE & RIQUELME

APDO POSTAL 93 BIS BALDERAS 36

MEXICO 1, D. F.

TEL. 6 15 30
CABLE GODAL

October 1, 1963.

12:19

Mr. J. A. Rivera
First National City Bank
I. la Católica # 54
México, D. F.

Dear Johnny:

Please be referred to our telephone conversation of this morning whereby you submitted the following problems for our consideration:

1. If a depositor requests payment of a credit balance in his account and said payment is refused by the bank due to an injunction order issued by a Court in the United States and subsequently issued by the depositor, would the Mexican courts accept the defense of the bank based on the injunction order?

2. Would your answer be affected if the injunction order is issued with an action brought by the United States to collect taxes from the depositor?

It makes no difference as far as the solution to the problems is concerned if the injunction order is based on a lawsuit filed by the United States government in order to collect taxes or not, and therefore the solution to the two foregoing queries can be resolved as follows:

A sentence or decree handed down by a foreign tribunal can be enforced in Mexico but it is necessary that same be requested by the foreign tribunal through the corresponding diplomatic channels. When the foreign sentence is sent to our Ministry of Foreign Relations, the latter in term will refer it to the Mexican Supreme Court so that it may be studied by a competent Mexican judge. It is absolutely necessary that the Mexican judge review and authorize the carrying out of the foreign decision in accordance with the principle of absolute sovereignty between nations.

So that a judge may authorize the enforcement of a foreign sentence it is necessary that the requisites set forth in Article 605 of the Code of Civil Procedure be met. These requisites are the following:

1. That the decision be dictated as a consequence of the exercise of an action en persona and not an action en rem, and based on real property located within Mexico.

2. That the defendant has been personally notified of the lawsuit.

3. That the fulfillment of the obligation being sought is lawful in Mexico, that is to say, the Mexican judge must analize the sentence to see if it is contrary to law or public interest. Should such be the case the judge will deny the carrying out of the sentence.

4. That the sentence be final, pursuant to the laws of the nation where issued. When I say "final" I mean that there is not any appeal which may be filed or which has been filed against the sentence.

5. Lastly, that the resolution be duly legalized.

Pursuant to Article 608 of the Code of Civil Procedure, the Mexican judge may not examine or decide on the justice or injustice of the sentence, nor on questions of fact or law but is limited to examining only its authenticity and if the necessary requisites, as set forth above, are met.

In view of the above, I can say that a sentence handed down by a judicial body in the United States can be enforced in Mexico and must be obeyed by a Mexican bank provided the sentence is sent through legal channels and its execution is reviewed and authorized by a Mexican judge.

Very truly yours,

Manuel García Iglesias.

MGI'Bes.-